86 1833

Supreme Court, U.S.
FILED
APR 24 1987
CLERK

No.___

IN THE SUPREME COURT OF THE UNITED STATES

October Term,1987

BERMAN J. WATTS JR., Petitioner,

v.

GENERAL TELEPHONE AND ELECTRONICS COMPANY OF THE SOUTHEAST , et al Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BERMAN J.WATTS JR.
P. O. BOX 12
Ft. Rucker,Alabama
36362
(205) 255-2309
(404) 622-3195

Pro Se

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1.Does a federal court of appeals in reviewing the district court decision under federal rule of civil procedure 52(a) or other applicable standard have discretion to avoid explicit answer of individual error of finding of fact issue cited by appellant when such error is both clear and pivotal to the decision reviewed ?

2.Does a federal court of appeals in reviewing the district court decision under federal rule of civil procedure 52(a) or other applicable standard have discretion to accept assertions of appellee as findings of fact that are based upon reasoning and evidence that are implausible,display inconsistency both within and between supporting testimony and documents and employ an invalidating degree of logical and extra-logical fallacy ?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Berman J. Watts Jr. and the Respondent General Telephone and Electronics Company of the Southeast.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

LIST OF PARTIES..... ii

OPININONS BELOW..... 1

JURISDICTION..... 2

STATUTE INVOLVED..... 4

STATEMENT OF THE CASE..... 8

REASONS FOR GRANTING THE WRIT..... 37

I.The lack of the federal appeals court explicit response to cited individual issues of error of finding of fact both clearly in error and pivotal to the decision reviewed is a discretion destructive towards the ends sought by such expediency of means.....37

II.The acceptance of respondent's assertions as findings of fact that are based upon evidence and reasoning that are facially implausible,internally inconsistent,conflict with extrinsic evidence and display an invalidating degree of logical and extra logical fallacy is in conflict with other Eleventh circuit decision,the decisions of this court and other circuits.....41

CONCLUSION.....48

APPENDIX (Opinions and Judgement of Court of Appeals , Memorandum Decision of District Court,.....).....49

TABLE OF AUTHORITIES

1.Anderson v. Bessemer City 84 L.Ed 2d 518.....39,41

2.Balogh's of Coral Gables v. Getz,778 F.2d 649.....39

3.Baylor v. Jefferson County Board of Education, 733 F.2d 1527.....39

4.Cox v. American Cast Pipe Co., 784 F.2d 1546.....39

5.Fowler v. Blue Bell,Inc., 737 F.2d 1007.....37

6.Lincoln v. Board of Regents of the University System of Georgia, 697 F.2d 928.....44

7.Moore v. Devine, 767 F.2d 1541.....39

8.Nix v. WLLY Radio/Rahall Communications 738 F.2d 1181.....43

9.Robinson v.City of Fairfield, 750 F.2d 1507.....39

10.United States v. International Business Machine Co. 66 F.R.D. 154....43

11.W.R.B. Corporation v. Geer 313 F.2d 750.....38

References

(1)Jensen and Horvitz,A Theorectical Framework for Quantifying Legal Decisions ,Jurimetrics Journal , Winter 1979 at 121. 46

(2)Tammelo,Outlines of Modern Legal Logic,(Franz Steiner Verlag Gmbh,1969) at 132,1,117. 46

(3)Reynolds,Law of Evidence (Fred B. Rothman & Co.)at 69. 39

STATUES

Title 28 U.S.C. §1254.....3

Title 28 U.S.C. §1331.....3

Title 28 U.S.C. §1343 (3), (4).....3

Title 28 U.S.C. §2072.....3

Title 28 U.S.C. §2201.....3

Title 28 U.S.C. §2202.....3

Title 42 U.S.C. §1866.....13

Title 42 U.S.C. §2000.....13

Federal Rules of Civil Procedure 52(a).5

IN THE SUPREME COURT OF THE UNITED STATES

October Term , 1987

BERMAN J. WATTS JR. ,Petitioner

v.

GENERAL TELEPHONE AND ELECTRONICS COMPANY OF THE SOUTHEAST,Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Berman J. Watts Jr. respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit,entered in the above entitled proceeding on December 16,1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit has not been reported. It is reprinted in the appendix hereto,p. 24a, infra.

The memorandum decision of the United States District Court for the Middle District of Alabama southern Division (Hobbs,D.J.) has not been reported. It is reprinted in the appendix here to,p.la,infra.

JURISDICTION

Invoking federal jurisdiction pursuant to 28 U.S.C.§1331,§1343(3) and (4), §2201 and §2202 as an action in equity and for damages authorized by title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§2000_et seq. Appellant brought this suit in the Middle District of Alabama Southern Division.On January 9,1986, the Middle District Southern Division denied the releif sought.

On appeal,the Eleventh Circuit on December 16,1986 entered a judgement and opinion affirming the Middle District of Alabama Southern Division decision. A petition for rehearing was timely sought and subsequently denied on January 29,1987.

The jurisdiction of this court to review the judgement of the Eleventh Circuit is invoked under 28 U.S.C. 1254(1)

STATUTES INVOLVED

28 USC §2072.Rules of Civil Procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings and motions, and the pratice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the court of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the seventh amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rule of Civil Procedure 52(a)

(a)Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state seperatedly it's conclusions of law thereon, and judgement shall be entered pursuant to Rule 58: and in granting or refusing interlocutory injunctions the court shall similary set forth the findings of fact and conclusions of law which constitute the grounds of it's action. Requests for findings are not necessary for purposes of review.Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial trial court to judge of the credibility of the witnesses.The findings of a master, to the extent that the court adopts them shall be considered as the findings of the court. It will be sufficient if the

findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.Findings of fact and conclusions of law are unnecessary on decisions of motions under rules 12 or 56 or any other motion except as provided in rule 41(b)

STATEMENT OF THE CASE

This cause arises out of respondent's formal appraisals of petitioner's work performance on April 28,1981 and November 30,1981 and respondent's discharge of petitoner on December 2,1981.Petitioner charged that respondent's actions were racially motivated and in retaliation for the filing of racial discrimination charges with the Equal Employment Opportunity Commission (EEOC). Respondent denied petitioner's charges and asserts that petitioner was discharged for unsatisfactory performance.

Petitoner was hired by respondent on July 23,1979 and assigned in a supervisory position at it's Durham,North Carolina plant.On December 5,1979 petitioner was transferred to respondent's Dothan,Alabama Division in a supervisory position. During the course of his employment at respondent's Dothan plant, petitioner was subjected to disparate treatment and other discriminatory employment practices and policies by respondent,all of which adversely affected his status as an employee. The intent of respondent's racially discriminatory employment practices and policies and the effect thereof was to deter and deny blacks as a Class from advancement into higher management and supervisory employment opportunities.

On account of his color,petitioner was discriminated against with respect to his compensation,terms, conditions, and priveleges of employment,including but not limited to: Work assignments;training and educational opportunities;harrassment and demeaning conduct by superiors;performance appraisals; the utilization of arbitrary and subjective standards to measure petitioner's job performance and to justify discriminatory management decisions; advancement and promotion into higher levels and salary increases.

During the course of his employment at respondent's Dothan plant,petitioner opposed respondent's unlawful employment practices through lawful channels, including respondent's administrative procedures and the Title VII administrative procedures of the EEOC. Because petitioner opposed respondent's unlawful employment practices and pursued administrative charges related thereto, respondent retaliated against him with respect to his compensation, terms, conditions and priveleges of employment; Respondent's retaliatory discrimination to petioner included but was not limited to the following:

(a)the arbitrary, unusual, and unjustified utilization of a "Provisional Management Performance Appraisal" on April 28,1981.

(b) implementation of a discriminatory performance appraisal on April 28,1981, designed to deny petitioner salary increases, merit increases, promotion,training and transfer;

(c) implementation of job developmental goals for petitioner which were unlawfully subjective, unattainable, and otherwise discriminatory;

(d) the utilization of unlawfully subjective, arbitrary, and discriminatory practices in implementing a performance appraisal for petitioner;

(e) discriminatory disciplinary practices and policies affecting petitioner;

(f) termination of employment.

On or about December 2,1981,respondent terminated petitoner's employment solely on account of his race and color and in retaliation for his having filed charges of discrimination against respondent.

Petitioner brought suit under 42 U.S.C. 2000 et seq., and the Civil Rights Act of 1866, 42 U.S.C. 1981. A non jury trial was held on December 2,1985. After issue was joined,respondent articulated various assertion of non-discriminatory reasons for it's unique treatment of petitioner. Such assertion was generally accepted as Findings of Fact in the Judgement denying relief sought on January 9,1986.The district court set forth it's findings of fact and conclusions of law in a memorandum opinion dated January 9,1986.

Various aspects of the memorandum opinion require emphasis:

(1) The introductory and concluding paragraphs of the findings of fact present an ultimate finding stating (p.3 a, infra):

> "Testimony and exhibits presented at trial disclose plaintiff's lack of technical expertise, intolerance of crticism by superiors, and inability to communicate with co-workers. The Court thus concludes that defendant discharged plaintiff because he was not performing his job satisfactorily."

(2) Supporting subsidiary finding cites evidence both specific and general. Where general it is presumed such evidence is limited to that presented in support of the subject finding.

Based on the logical and extra logical fallacies, inconsistency, conflict with extrinsic evidence and facially implausible nature of supporting evidence petitioner appealed to the Eleventh Circuit.

The Eleventh circuit did not answer the individual issues of error cited in petitioner's argument but affirmed the district court decision citing unspecified "ample" evidence (p.27 a, infra).Specifically cited error of finding of fact was crucial to the "truth and right"of the case.

Intolerance of Criticism

The district court presumes and the eleventh circuit affirms as a finding of fact that intolerance of criticism by superiors is an indicator of unsatisfactory performance serious enough to justify firing (p.3 a, infra). Yet the respondent never asserts such reason as a contributing cause for actions taken against petitioner. Nor is such reason expressed as a policy of the respondent. Moreover, extreme tolerance of the intolerance of criticism by superiors for another is revealed in the findings citing the testimony of Leroy Davis. Such criticism by that employee's superiors of his efforts to train and assign C.O.E. supervisors is inherent in the necessity for the corporate office's training program. Yet even at trial this employee freely criticises such program (p.5,6a infra). The lack of the articulation of such "intolerance" as cause for different

and detrimental treatment towards petioner combined with a demonstrated license with regard to such intolerance by another cannot plausibly result in conclusion that such cause demonstrates unsatisfactory performance sufficient for cause as a nondiscriminatory cause for firing.

But,even if "intolerance of criticism by superiors" was a valid nondiscriminatory cause for firing, the cited support for such finding rests on the effect of a quote from a response of petitioner's that the involved management could not have read at that time.The findings quote petitioner's analysis of respondent's April,1981 appraisal (p.13a,infra):

"Mr. Watts responded to Mr. Brackin's evaluation by submitting an "analysis" of the appraisal to GTE in which he accused Mr. Brackin of racial discrimination and demonstrable breaches of business,moral and legal ethics."

In the petioner's Eleventh Circuit brief it is noted that p. 24,:

"It was impossible to immediately respond to the appraisal in detail since no copy was obtained (Px 1,Tab 7,May 26,1981 letter to EEOC).The detailed analysis quoted in the findings was not completed and submitted until after termination. (Px.1,Tab 7,July 22,1982 Letter to EEOC)"

Such cited example of the "intolerance of criticism by superiors"as an action contributing to the supervisor's actions would require that the involved document be made available before it was written and submitted.Where effect precedes cause implausibility and /or pretext is virtually always evident.

Oral Communications

The finding of an inability to communicate orally cites evidence depicting an implausible scenario consisting of inconsistent testimony and exhibits in conflict with extrinsic evidence. Assertion accepted as findings of "oral communications" problems first surfaces in the initial Dothan, Al. appraisal (p.12,Aplt.Br.) as a single conclusion (p. 7a, infra,Dx 14(62)) but that document neither supports such conclusion or cites specific incident p.12,Aplt Br.) This oversight is corrected only at trial by the copious tailored testimony of Mr. Parker as cited in the findings (p.8 a,infra) about complaints involving communication with appellant by others so extensive and pervasive that they lead to a recommendation for firing but were never recorded in the appraisal used to initiate such action. Such

individual's testimony is also inconsistent (p.17 ,18 ,19, Appellants'Br.)

After such appraisal and the imposition of short term "disciplinary" or virtually impossible (but uncontrovertedly completed) goals and after petitioner filed his initial EEOC complaint,the respondent used the April 1981 appraisal to cite specific incidents of "communication problems" retroactively dating from the time the disciplinary goals ended (p.11a,infra), but ignoring the fact of record increases in the objective performance measures of the office since that time p.29 ,Appellant's Br.)

Almost immediately respondent's agent establishes special goals required for continued employment.Measurement is by the subjective reports and actions of the supervisor's (Brackin) white,long term associates with regard to petitioner even though members of such group had expressed hostility as noted in the incidents prior cited against petitioner (p. 14a,infra).

The findings directly conflict with all available subject evidence upon stating that petitioner immediately responded to his April 1981 appraisal with an inflammatory analysis (p.13a,infra). As previously noted in the prior section all evidence developed on the subject is to the contrary.

Testimony that no supervisor, white or black, was given such goals because they did not exhibit problems as severe as petitoner's (p15a,infra) neglects the fact that no other individual had filed EEOC complaint. But further question is raised by the events that follow such assignment of goals (p.25,26 Appellant's Br.)

Subsequent incidents timing and frequency could not better serve a predecided goal of termination had they been planned and executed for that purpose.From a sporadic start allegedly spontaneous incident and grievance peak in intensity during October and early November. However on November 6,1981 they cut off as if switched. No need for further pretext in the November appraisal was evidently needed and none "spontaneouosly" occured. The evident presumption that reality rather than pretextural contrivance so spontaneously conform to respondent's just instituted and unique criteria only for the period needed and peaking just prior to the need for written input for appraisal is implausible and incredible.

The incidents listed even lack a credible or plausible linkage to the defect alleged. The nature of such grievance and incident very seldom involve communication of any kind but instead involve choices of equally damamging consequences as presented by respondent.

The findings cite conflicting testimony about petitioner's alleged "oral communications problems" (p.30 - 32,Aplt's Br) Simply comparing such testimony and the list of incidents shows no other individual testifies to support any of the complaints and reports Brackin lists.

Brackin's list of incidents (p13a,infra) is admitted to have occured in a telephone toll office yet the normal operating logs and business records supporting the truth of any such events have been consistently witheld despite petitioner's repeated requests (p.23 Ap.Br.). The matter is thus left to stand on the respodent's bald statement.Such need and action would be required if one's rendition of events were in conflict with such record.

The finding that two black supervisors had no grievances (p.8a, infra) during the period of petitioner's supervisory employment neglects another black supervisory employee (Mr. Darden) and also ignores the fact that Mr. Brown was not a supervisor at the time (p. 19, Ap, Br). The fact that different employees were supervised is also omitted.Petitioner's work group included the Union leadership that made grievance in the union's name about individuals not supervised and matters not grieved against whites (TR 435,436)

Ms. Boyd,Questioning Mr. Durr:

Q.Do you know who the union president was when Mr. Watts was employed?

A.....Frank Woodham.....

Q. Do you know whether or not he was under Mr. Watts supervision?

A.Yes he was in the Toll center.

Q.Do you know who the union Secretary was?

A. Joyce Lingo

Q. Was she under Mr. Watts supervision?

A. Yes

Mr. Brown's group as DX.64 shows was in a different area of responsibility and therefore not over the same employees when he was palced in management after petitoner was fired.

Respondent's support for the assertion of "oral communications problems rest upon a series of obvious contrivances that are progressively enlarged as needed.The acceptance of such contrivance encourages such groups to administratively lynch any minority member who files complaint.Pretext for uniquely destructive treatment is a story that is not facially plausible or consistently told even as applicable record is witheld thus limiting evidence of such assertion to respondent's bald statement.

Technical Expertise

Findings limit mention of petitioner's satisfactory performance to his testimony (p. 21a , infra) but findings also cite the appraisals (p. 12a, 16a, infra) to support a finding of unsatisfactory performance while ignoring satisfactory performance admitted therein, contradicting such appraisals' and allied testimony's assertion of unsatisfactory performance.

That virtually nothing less than satisfactory ratings on the objective portions of the April 1981 (PX 8) and November 1981 appraisals (PX 15) are evident is uncontroverted.Even though such ratings aren't necessarily acknowledged the quantitative ranges for the satisfactory rating or better in each objective goal is clearly obtained.Even during the siege of October 1981,only a single factor falters although not to the worse levels normal prior to petitioner's responsibility.

Further inconsistency arises from the uncontroverted fact of improvement in the objective independently observed indices of toll office performance immediately upon petitioner's responsiblity in the area (late 1980) and during his stay.

Despite worse results both prior to and after petitioner's presence other cause is claimed as responsible for such improvement by Brackin (Appellant's Brief p.29) yet in later rate hike hearings it is admitted that after petitioner's firing toll performance due to "equipment Problems" had become so bad in the period after petitioner's firing that massive expenditure for new equipment was justified (Appellant's Br.p.21,22).

Such rate hike hearing excerpts futher show inconsistency of respondent's assertions by describing the involved equipment as very complex (Appellant's Br.p.21,22). Yet respondent initially contended in the June 1980 appraisal(DX 14 (62)) that petitioner could not do the simplest of functions in the TAC center (such as use an automatic dialer after local instruction). Such assertion is further contradicted in the same document by the admission that the petitioner designed and constructed programmable I.D. switches that eliminated errors on (telecommunications) traffic studies (Appellant's Brief p.17,18).Further conflict with extrinsic evidence is shown by the admission that petitioner,as the least experienced employee in the TAC center was assigned the relatively hazardous and externally reported initial office battery cycle tests and procedures

for the Alabama Division.Such assignment continued during the time the same document contends petitioner could not perform the simplest of office functions (aforementioned automatic dialing or slotting)DX 14 (62).

Findings also apply an exclusive standard to petitioner that is meaningless if not misleading unless applied comparatively.The presumption of inexpertise against petitioner based on the exclusive recital of his academic (p.2a,infra) performance in a comparative vaccum permits fallacy. If petitioner's expertise or any other relative factor is measured by his college performance then his supervisory peers should be simarily measured since it is they he is held as inferior to. Ample uncontroverted evidence of such performance is available from testimony (Appellant's Brief p.6,7,8):

Mr. Brackin the immediate supervisor testified that college performance was not a factor in his assessments and that he flunked out of Troy State College of Troy,Alabama.

Mr. Parker indicated that he had two years "Officers Training" in Atlanta but a completed associates degree from Wallace State Junior College.

Mr. Davis,although asked about his background, indicated no level of formal civilian schooling completed whatsoever.

Mr. Durr indicated that he had an Associates degree from a two year technical school.

The remaining individuals stated high school was their highest academic experience.

Inference of petitioner's inferiority based upon academic training and performance are in light of respondent's simarily and superior situated individual's level of such training and performance,implausible.The assignment of atypical and subjectively based goals based upon such technical lack,is therefore without a non-discriminatory or non-reprisal basis worthy of credence.The finding of a lack of technical expertise is also thus affected.

Statement of the Case Conclusion

The major logical and extralogical fallacies,inconsistencies,implausibilities and conflicts with extrinsic evidence of respondent's assertions accepted as findings of fact are outlined in the preceding statement of the case. The findings cite such evidence displaying such defect as support while ignoring evidence lacking such defect but to the support of petitoner's cause and a rendition of events not in conflict with objectively verifiable factors.

REASONS FOR GRANTING THE WRIT

I.The appeals court exceeds it's discretion under the clearly erroneous standard and other standard of review established by this court when it fails to explicitly address cited issues of error of finding of fact that are pivotal to the"truth and right"of the case.

[1] In Fowler v. Bluebell,Inc. 737 F.2d 1007 (1984) the Eleventh Circuit held that:

> "Requirement under clearly erroneous standard of review that court of appeals review record as a whole precludes any argument that merely pointing out facts that may cut against district court's interpetation and that the court would not discuss explicitly are grounds for overturning the finding."

Such holding is reiterated in Castenda by Castenda v. Pickard 781 F.2d 456 (5th Cir. 1986):

"This requirement that we review the record as a whole precludes any argument thast grounds for reversal can be found by merely pointing out facts which the court did not explicitly discuss even if these facts cut against the district court's interpetation."

Yet the former Fifth Circuit in W.R.B. Corporation v. Geer 313 F.2d 750 held that

",court is entitled to assistance of counsel in pin-pointing both the specific issues under attack and the revelant portion of the record demonstrating the asserted presence or absence of evidence"

In the present case, the pinpointed multitude of specific error issues under attack do not merely cut against the district court interpetation. They, instead are crucial points basic to the logical structure of the district court's interpetation of an assertion of real events crucial to Title VII protection. Without these multiple keystones of illogic the whole structure collaspes. Being crucial to the facts of the case

any standard of review that excludes review of such issue sacrifices the ultimate ends sought by such expediency of means.

[2] If consideration is limited to the evidence as a whole without explicit response to cited and pivotal objective evidence contradicting the witnesses' story,or the internally inconsistent and/or implausible nature of such story then the violation of this court's precedent established in Anderson v. Bessemer City (p.41 , infra) is enabled.

[3] In other cases the eleventh circuit has explicitly addressed error of finding of fact issues in detail.Cox v. American Cast Iron Pipe Co.,784 F.2d 1546;Balogh's of Coral Gables v. Getz,778 F.2d 649;Moore v. Devine,767 F.2d 1541;Robinson v. City of Fairfield, 750 F.2d 1507;Baylor v. Jefferson County

Board of Education, 733 F,2d 1527. For the fact is that if equal justice under law is pursued then the process by which cases are selected for the review of individual errors of finding of fact(in the Eleventh Circuit)for explicit address . should be revealed to avoid the provision of a cloak for arbitrary decision.

II.Acceptance of Respondent's assertions as findings of fact that rest upon evidence and reasoning that are implausible,internallyinconsistent,conflict with extrinsic evidence and display an invalidating degree of logical and extra-logical fallacy is in conflict with other eleventh circuit practice,the decisions of this court,other circuits and reason.

Faults of logic in a structure that claims reason as intergral to it's structure can cause collaspe.The present judgement rests upon such findings in the form of errors so basic and crucial as to require the reversal of the district court decision and the granting of the petition to demonstrate such fact.

[1] In Anderson v. Bessemer City 84 L.Ed 2d 518 this court has held that:

"Documents or objective evidence may contradict the witness' story: or the story itself may be so internally inconsistent or implausible on it's face that a reasonable fact finder would not credit it. Where such factors are present the court of appeals may well find clear error even in a finding purportedly based on a credibility determination."

In the present case it is not the matter of a single implausibility or inconsistency but of many. Moreover, such evidentiary error is in conflict with the basic rules of evidence as presented in (3) The Law of Evidence p.69;:

"Facts must be proved by the best kind of evidence avaiable"..This rule relates to the quality of evidence, and not to it's quantity, and it operates to exclude only that evidence which itself indicates the existence of more original sources of information."

Yet the findings repeatedly cite as support evidence that is in conflict with contemporaneous documents.

in the United States v. International Business Machine Corporation 66 F.R.D. 154 (1974) this court held that:

"When oral testimony is contradicted by contemporaneous documents trier of fact should give little weight to oral testimony."

Again the findings of fact of the present case rest upon cited testimony of respondent's witnesses despite conflict with documents contemporary with the events. Due to such defect the quality of the copious testimony respondent generates is compromised. This lack of quality demonstrates the insubstanial nature of respondent's evidence cited as support for the findings of fact.

[2] Even if such evidence is ample, in Nix v. WLLY Radio/Rahall Communications 738 F .2d 1181 (1984), the Eleventh Circuit has held that;

""Clearly erroneous" standard of review requires substantial deference to findings of district court, but such deference is not unlimited, and the court of appeals will hold findings of fact clearly erroneous if the record lacks substantial evidence to support it."

And again in the Eleventh Circuit

W.R.B Corporation v. Geer 313 F.2d 750

(1963);

"The "clearly erroneous" concept embodied in Federal Rules of Civil Procedure as standard to be applied in detrmining whether to accept findings of master or trial judge requires, for acceptance, that evidence be "substantial evidence" but it does not end there and findings must be set aside if the court is left with impression that result is not truth and right of the case, and in this sense, at least , the terms are not synonymous."

In Lincoln v. Board of Regents of the

University System of Georgia 697 F.2d 928

the Eleventh Circuit reiterates:

"Even if substantial evidence supports factual findings of district court, court of appeals must consider evidence as a whole and set aside if it is left with impression it is not truth and right of case."

The discordant clamor of implausibility, inconsistency and conflict with extrinsic evidence by that which is cited as it's support create the impression that the decision reached is not the " truth and right" of the case.

[3] If logic and common sense join in showing a particular rendition of events to be implausible then the logical defects and lack of internal consistency cannot be denied without denying reason. And if reason is denied, what may not happen? The corpse of justice (in NAZI Germany) animated by the the demons of demagogy and political expediency combined with the ideas of a jurist to produce the holocaust.

The (Judge's) decision still must be inexorably linked to the facts of the case (1).In legal reasoning formal consistency of thought is an end constantly pursued,even though it is not always achieved. To assure this consistency,ordinary common sense logic is employed,..(2) there are numerous occasions in legal reasoning in which reasoner try to decieve their opponets or the decision maker (and sometimes even succeed in deluding themselves) about the logical necessity of their conclusions. To expose the formal defects of their argumentation is often unfeasible by means of informal reasoning. Recourse to principals and methods of logic is frequently the only safe way to identify the source of fallacies and to ascertain that a fallacy has been committed (2).

Logic serves,of course, the pursuit of truth; however, the end which logical procedures primarily follow is correctness in reasoning. Logical fallacy arises because certain basic assumptions of logical reasoning are not observed (2). Such fallacy characterise respondent's assertions that were accepted as findings of fact by the district court. Such error is here outlined and on appeal cited but not explicitly answered.

[4] The district court does not indicate if judicial notice was taken of the nature of respondent's business and it's possible effect on the course of proceedings below. But as a legally constituted public utility the dependence upon rate increases ruled on by triers of fact puts a premium on the practised skill of expressing the demeanor triers of fact find indicative of truth.

For all of the reasons set forth above and in our papers previously submitted and on file, petition should be granted and the decision and orders appealed from should be reviewed by this court.

Berman J. Watts Jr.
Petitioner
P.O. Box 12
Ft. Rucker, Alabama
36362
205-255-2309
404-622-3195

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

Three copies of the foreging were served on the Respondent's represenative on May 12th 1987.

Those copies were sent with sufficient prepaid postage to Hill,Hill, Carter, Franco,Cole & Black at P.O. Box 116, Montgomery, Alabama,36195

Berman J. Watts Jr.
P.O. Box 12
Ft. Rucker,Alabama
36362
205-255-2309
404-622-3195

APPENDIX

IN THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF ALABAMA SOUTHERN DIVISION

BERMAN J. WATTS, JR.)

Plaintiff) CIVIL ACTION NO.
84-H-1216
)

vs.
)

GENERAL TELEPHONE CO.
OF THE SOUTHEAST)

Defendant)

MEMORANDUM OPINION

Plaintiff brings this action under Title VII of the Civil Rights Act of 1964,as amended,42 U.S.C 2000e et seq. seeking injunctive relief, reinstatement and back pay. This Court takes jurisdiction pursuant to 28 U.S.C. 1343(3) and (4).

This cause arises out of defendant's formal appraisals of plaintiff's work performance on April 28,1981 and November 30, 1981 and defendant's discharge of plaintiff on December 2,1981. Plaintiff alleges that defendant's acts were racially motivated and done in retaliation for plaintiff having filed racial discrimination charges against defendant with the Equal; Employment Opportunity Commission (EEOC).Defendant denies plaintiff's allegations and asserts that plaintiff was discharged for unsatisfactory performance of his job. A nonjury trial was held on December 2,1985. The Court now sets forth its findings of fact and conclusions of law pursuant to Rule 52,Federal Rules of Civil Procedure. For the reasons herein set forth, the Court finds that defendant is due a judgement in its favor.

FINDINGS OF FACT

The testimony and exhibit's presented at trial disclosed plaintiff's lack of technical expertise, intolerance of criticism by superiors, and inability to communicate with co-workers. The Court thus concludes that defendant discharged plaintiff because he was not performing his job satisfactorily.

In 1972, following a period of academic probation,plaintiff Berman J. Watts graduated from Georgia Institute of Technology with a degree in Aerospace Engineering and a 2.0 grade average, the minimum required for graduation. Unable to find a position as an aerospace engineer, Mr. Watts accepted a position as "loss prevention engineer " with Factory Mutual Engineering (FME) in 1973. Mr. Watts was discharged by FME in 1978 due to the company's conclusion that he was not performing satisfactorily. After working in several positions unrelated to his college degree, Mr. Watts submitted an application to defendant General Telephone Company of the Southeast (GTE) in which he omitted his "Reason for Leaving" his job with FME.

GTE hired Mr. Watts in July, 1979 as a "central office Equipment (COE) supervisor trainee" and immediately sent him to a 20-week training school. The job of COE supervisor involved troubleshooting and directing technical specialists. In December, 1979, Mr. Watts was assigned to Mr. Leroy Davis, Switching Services Manager of GTE's Alabama division. Based on the testimony, the court finds that the training given plaintiff and several other COE supervisors was less than optimoum for the preparation of persons to be COE supervisors.

Mr. Davis testified that most of GTE's COE supervisors begin with GTE as COE technicians and work their way up through the craft ranks so that most have an excellent knowledge of GTE's central office equipment before they become COE supervisors. Mr. Davis further testified that he had personal knowledge of four white male COE supervisors who had been trained in GTE's 20-week training school, as was Mr. Watts, but who had eventually left GTE or had been discharged due to a lack of technical expertise.

Because no "COE supervisor" positions were available when Mr. Watts completed the training program, Mr. Davis assigned him to the Trouble Analysis Center (TAC), which primarily aids COE supervisors in troubleshooting their equipment. In June, 1980, Mr. Watts was formally evaluated by his supervisors in TAC, Mr. Outlaw and Mr. Parker, in accordance with GTE's policy of conducting formal performance appraisals six months after an employee is assigned to a new position,again six months later and annually thereafter. Mr. Watts received a performance rating of "Below Expectations" from Mr. Parker amd Mr. Outlaw, who recommended that Mr. Watts be transferred to another position or terminated. The poor evaluation was based on Mr. Watts supervisors' conclusions that he lacked "human behaviour skills and technical expertise." In response to

the poor appraisal, Mr. Watts demanded that his rating be changed to "excellent" and accused his supervisors of having made false statements regarding his performance.

At trial, Mr. Parker testified that while Mr. Watts was under his supervision he received several complaints regarding Watts' attitude and behaviour from other GTE employees as well as from represenatives of other companies who had communicated with Mr. Watts by telephone. Although Mr. Watts attributed his poor evaluation by Mr. Parker to racial discrimination, Mr. Parker has recommended six black employees for promotion, and Mr. Watts is the only black he has ever recommended for termination.

Rather than terminating Mr. Watts as suggested by his TAC supervisors, GTE decided to place him on probation with 30 day goals to complete. In September, 1980, having accomplished these goals, Mr. Watts was offered a position as a COE supervisor in GTE's Dothan Toll center under the supervision of Wayne Brackin. Three of the primary pieces of equipment in the center are the 91A PCM Carrier, the SATT, and the 104 Toll Director. GTE had sent Mr. Watts to 91A PCM Carrier classes while he was assigned to TAC. In addition Mr. Brackin sent Mr. Watts to approximately six weeks oof schooling on the SATT and 104 Toll Director immediately upon his assignment to the toll center. Thereafter, Mr. Watts received on the job training from Mr. Brackin and other COE operators at the toll center. Plaintiff presented no evidence that white COE supervisor

trainees who had been trained at GTE's 20 week training school received better or different additional training before becoming COE supervisors.

Upon Watts' completion of his additional training on SATT and the 104 director, Mr. Brackin gave Mr. Watts written goals in which he was required to develop a working knowledge of the equipment under his supervision by February 27,1981. Plaintiff charges that Mr. Brackin evidenced racial discrimination in assigning him such goals which had never been assigned to any other COE supervisors, white or black by Mr. Brackin because all other COE supervisors who had been assigned to him had already acquired a working knowledge of the equipment prior to becoming COE supervisors. The court finds such goals assigned to plaintiff are reasonable and do not indicate any racial discrimination.

On April 28,1981 Mr. Brackin completed his first formal appraisal of Mr. Watts' job performance in which he rated Mr. Watts as "provisional," or just above "unsatisfactory." While Mr. Brackin's appraisal included his opinion that Mr. Watts had a "highly defensive" attitude, "poor judgement," and only "marginally acceptable" technical skills, Mr. Brackin also noted that "with continued emphasis and initiative on his part, I expect his performance to progress to an acceptable level." In addition, Mr. Brackin listed the following incidents involving Mr. Watts which influenced his opinion of Mr. Watts' performance:

1. a disagreement between Mr. Watts and Co-employees while attending trainig classes in Texas;

2.an argument between Mr. Watts and another supervisor;

3. reluctance of Mr. Watts to work with Mr. Brackin on developing goals;

4. Mr. Watts' failure to follow direct instructions from Mr. Brackin concerning problems in GTE's Midland City office; and

5. Mr. Watts' failure to follow GTE's policy of keeping the Dothan Toll Testboard manned twenty four hours a day.

Mr. Watts responded to Mr. Brackin's evaluation by submitting an "Analysis" of the appraisal to GTE in which he accused Mr. Brackin of racial discrimination and "demonstrable breaches of business, moral and legal ethics."

In May, 1981, Mr. Brackin gave Mr. Watts revised written goals. Mr. Brackin reviewed these goals with Mr. Watts on June 1,1981,but Mr. Watts refused to concur in them. The revised goals included a modified version of Watt's former developmental goals as well as the following:

7. Improve oral communications with craft employees to the point where oral and written greivances do not exceed those of other supervisors in the same work group.

8. Develop a harmonious rapport with associated departments. Measurement of this objective will be from reports to myself of positive or negative responses to myself or superiors.

Mr. Brackin testified that he had previously given three white COE supervisors "minor goals" which required them to develop better communication skills, but there was no evidence that these men's communication problems were as severe as those of Mr. Watts. Mr. Brackin further testified that no other black COE supervisor assigned him had been given goals concerning development of communications or interpersonal skills because no other had needed such goals.

On September 23,1981,plaintiff filed a racial discrimination charge against GTE with the EEOC complaining that Mr. Brackin had treated him adversely in retaliation for plaintiff having filed a former EEOC charge in December, 1980, which had been conciliated.

On November 30, 1981, Mr. Brackin completed his seconf formal appraisal of Mr. Watts' work performance in which he recommended termination due to Watts' "continued unacceptable performance" resulting from his lack of ability to communicate effectively with and direct the activities of his work group, his use of poor judgement and total inability to get along with his fellow employees."Mr. Brackin testified that he gave Mr. Watts an "unsatisfactory" rating on his goal of improving oral communications because, during the rating period, Mr. Watts had six union greivances filed against him as opposed to only one grievance having been filed against the other two COE supervisors in his work group. Although Mr. Watts proposed that the excessive grievances filed against him were motivated by racial animus, the evidence showed that no grievances were filed

against Mr. Willie Durr, another black COE supervisor, during the entire period Mr. Watts served as a COE supervisor, and that Mr. W.A. Brown, another black COE supervisor was commended on a formal performance appraisal by Mr. Brackin for improving relations with craft employees.

On the November, 1981 evaluation Mr. Brackin listed the following incidents which influenced his recommendation that Mr. Watts be terminated:

1.Mr. Watts' repeated failure to identify himself when making or receiving business calls;

2.Mr. Watts' failure to follow a direct instruction from Mr. Brackin concerning replacement of an absent employee;

3.Mr. Watts' failure to keep an appointment to provide a building tour to a new employee;

4.Mr. Watts' failure to perform a job assigned to him by Mr. Brackin.

5.an argument between Mr. Watts and Mr. Brackin,initiated by Mr. Watts;

6.an unecessary call from Mr. Watts to Mr. Brackin's home at 12:55 A.M., during which Mr. Watts hung up on Mr. Brackin;

7.Mr. Watts' inability to correct a problem with the SATT equipment;

8.Mr. Watts' failure to follow Mr. Brackin's advice on answering a union grievance;

9.complaints to Mr. Brackin by Mr. Watts' co-workers concerning Watts' attitude and behavior.

10.Mr. Watts's failure to consider all relevant factors in evaluating a subordinate and recommending him for a management position;

11.complaints from co-employees to the Personnel Manager and to Mr. Davis about Mr. Watts' behaviour at a grievance meeting; and

12.poor judgement on Mr. Watts' part in his attempt to solve an equipment breakdown.

GTE discharged Mr. Watts on December 2,1981. Mr. Watts filed a third charge with the EEOC on December 14, 1981, alleging that GTE discharged him because of his race and in retaliation for his having filed previous EEOC charges. On March 31, 1983, the EEOC issued a determination of "reasonable cause" to believe the allegations in plaintiff's September, 1981 and December, 1981 charges. On June 21,1984, the EEOC directed to plaintiff a "right to sue" letter. Plaintiff timely commenced this action on September 18, 1984.

At trial, GTE presented testimony by Mr. Watts' supervisors concerning his lack of technical skill and his inability to communicate with co-employees. Defendant also produced evidence of written and oral complaints received by Mr. Brackin which reflected these shortcomings. In addition, GTE's staffing and development manager testified that the utilization of black employees in GTE's Alabama division met or exceeded affirmative action guidelines based on OFCCP

regulations during the period from 1979 to 1983. In contrast, plaintiff did not call a single witness to support his claim of discrimination, nor did he produce any statistical evidence of racial discrimination by GTE. No witness, other than plaintiff himself, testified that Mr. Watts' performed satisfactorily while employed with GTE.

CONCLUSIONS OF LAW

Plaintiff proved a prima face case of retaliation through evidence that he engaged in activity protected under 42 U.S.C. 2000(3) (a), that he was treated adversely by his employer, and that the adverse treatment followed closely enough upon the protected activity to establish a causal link between them.

Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir.), reh'g denied, 714 F.2d 1066 (11th Cir.) ,cert. denied, 104 S. Ct. 1415 (1983).However, defendant produced convincing evidence that its poor evaluations and subsequent termination of plaintiff resulted from plaintiff's technical ineptitude and plaintiff's difficulty in communicating and getting along with other employees. Since plaintiff failed to prove that the reasons defendant gave for its actions were pretextural or that racial animus was the true motive behind defendant's adverse treatment of plaintiff, this court is compelled to deny plaintiff the relief he seeks. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Hamm v. Members of the board of Regents of the State of Florida, 708

F.2d 647 (11th Cir.), reh'g denied,715 F.2d 580 (11th Cir. 1983)

The court has not decided whether plaintiff proved a prima facie case under a disparate treatment theory since the outcome of this case would not be altered by such a finding. See Burdine, 450 U.S. 248.

A seperate judgement will be entered in accordance with this memorandum opinion.

DONE this 9th day of January, 1986.

/s/Truman Hobbs

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7177
Non-Argument Calender

BERMAN J. WATTS, JR.,

Plaintiff-Appellant,

versus

GENERAL TELEPHONE COMPANY OF THE SOUTHEAST,

Defendant-Appellee

Appeal from the United States District Court for the Middle District of Alabama

---

(December 16, 1986)

Before RONEY, Chief Judge, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant Berman J. Watts brought an action pursuant to Title VII, 42 U.S.C. 2000(e) et seq., against his former employer, General Telephone Company of the Southeast, seeking injunctive releif, reinstatement and back pay. Watts claimed that his termination by the company was racially motivated and done in retaliation for his having filed discrimination charges against the company with the EEOC. After a bench trial the district court made extensive findings of fact. The court concluded that although Watts proved a prima facie case of retaliation, the company produced ample evidence that its termination of plaintiff was due to unsatisfactory performance on his job: lack of technical expertise, inability to accept criticism by superiors and to communicate with coworkers, and unsatisfactory evaluations, and that Watts failed to

produce any evidence that the reasons advanced by the company were pretextural. The court thus concluded that appellant's discharge was not based upon discrimination but was due to his unsatisfactory performance. Accordingly the court rendered judgement for the company. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248.

The determination of discrimination is a Title VII case is an ultimate fact issue and is reviewed by an appellate court under the "clearly erroneous" standard. Robinson v. City of Fairfield, 750 F.2d 1507 (11th Cir. 1985); Baylor v. Jefferson County Board of Education, 733 F.2d 1527 (11th Cir. 1984). Our review of the record convinces us that the trial cour's findings of fact were not clearly erroneous but were amply supported by the evidence. The Judgement below is AFFIRMED.

UNITED STATES COURT OF APPEALS

Eleventh Circuit

50 Spring Street. S.W.

Atlanta, Georgia 30303-3147

January 29,1987

TO ALL PARTIES LISTED BELOW:

No. 86-7177-BERMAN J. WATTS, JR.
-vs- GENERAL TELEPHONE COMPANY OF THE SOUTH-EAST (D.C. No, 84-H-12 16-S

This is to advise that an order has this day been entered denying the petition ( ) for rehearing.

✓ ---- No member of the panel nor the judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26),the petition ( ) for rehearing en banc has also been denied.

See rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

MIGUEL J. CORTEZ,
CLERK

By:/s/Joanne Kolin

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7177

BERMAN J. WATTS JR.,

Plaintiff-Appellant

—

versus

GENERAL TELEPHONE COMPANY OF THE SOUTH-EAST,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion DECEMBER 16,1986, 11 Cir., 198 , F.2d ---------- (JANUARY 29,1987) ---- ----)

Before RONEY, Chief Judge, HILL and Kravitch, Circuit Judges

PER CURIAM:

( ) The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure;Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH

UNITED STATES CIRCUIT JUDGE